

New Hampshire
Implementation of New Definitions for Independent Contractors
Effective January 1, 2008

The following are excerpts from Senate Bill 92 – Chapter 362 – An Act relative to the definition of employee and clarifying the criteria for exempting workers from employee status. It is provided here for informational purposes only. Please refer to the Labor Department website www.labor.state.nh.us for additional information.

RSA 281-A: 2 Definitions – VI.

- (a) “Employee” with respect to private employment, means any person in the service of an employer subject to the provisions of this chapter under any express or implied, oral or written contract of hire except a railroad employee engaged in interstate commerce whose rights are governed by the Federal Employers’ Liability Act. If they elect to be personally covered by this chapter, “employee” includes persons who regularly operate businesses or practice their trades, professions, or occupations, whether individually, or in partnership, or association with other persons, whether or not they hire others as employees.

- (b) (1) Subject to the preceding subparagraph, any person, other than a direct seller or qualified real estate broker or agent or real estate appraiser, or person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, who performs services for pay for an employer, is presumed to be an employee. This presumption may be rebutted by proof that an individual meets all of the following criteria:
 - A. The person possesses or has applied for a federal employer identification number or social security number or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.
 - B. The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.
 - C. The person has control over the time when this work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.
 - D. The person hires and pays for person’s assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants’ work.
 - E. The person holds himself or herself out to be in business of himself or herself.
 - F. The person has continuing or recurring business liabilities or obligations.

- G. The success or failure of the person's business depends on the relationship of business receipts to expenditures.
- H. The person receives compensation for work or services performed and remuneration is not determined unilaterally by the hiring party.
- I. The person is responsible in the first instance for the main expenses related to the service or work performed. However, this shall not prohibit the employer or person offering work from providing the supplies or materials necessary to perform the work.
- J. The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.
- K. The person supplies the principal tools and instrumentalities used in the work, except that the employer may furnish tools or instrumentalities that are unique to the employer's special requirements or are located on the employer's premises.
- L. The person is not required to work exclusively for the employer.

Situations will exist where there is a dispute between the employer and the insurance carrier as to whether an individual is an independent contractor or an employee. Under these circumstances there is a hearing process available at the Department of Labor where insureds and carriers can have these disputes addressed. See RSA 281-A:43, III(a).

As for a carrier's obligations under NH insurance laws, RSA 412:35 states that any post audit final premium charged shall be "based upon actual exposure existing during the term of the policy coverage." A carrier is not permitted to charge a premium if there is "possible" exposure. Only employees are eligible to recover under an employer's workers compensation policy; therefore, "actual exposure" exists only if a worker is an employee of the employer securing coverage pursuant to the definition in RSA 281-A:2 VI.

When determining actual exposure under RSA 412:35, a carrier may not impose its own test for determining the employee-employer relationship. The legislature has in RSA 281-A:2, VI defined who is an employee that must be covered under a policy of workers compensation secured by the employer. A carrier shall not use criteria for making a determination of actual exposure in these situations if those criteria do not conform with those in RSA 281-A:2 VI.

Therefore, before a carrier can establish that a worker who claims to be an independent contractor is an "actual exposure" under RSA 412:35, it must, through inspection of records and operations of the insured, determine and document that the worker fails to meet at least one of the criteria of RSA 281-A:2, VI (b) (1) (A) –(L). If the carrier charges a premium for a worker claiming to be an independent contractor without establishing that the worker does not meet the criteria in RSA 281-A:2, VI (b) (A)-(L), the carrier is in violation of RSA 412:35.